No. 76-572

# In the Supreme Court of the United States

OCTOBER TERM, 1976

DAN B. BUZZARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

DONALD I. BAKER,
*Assistant Attorney General,*

ROBERT B. NICHOLSON,
WILLIAM D. COSTON,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 540 F. 2d 1383.

### JURISDICTION

The judgment of the court of appeals was entered on August 23, 1976. Petitioner's timely petition for rehearing with suggestion of rehearing *en banc* was denied on September 27, 1976 (Pet. App. 11a). The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the allegations of an indictment charging the fixing of retail liquor prices in violation of Section 1 of the Sherman Act permitted the government to prove

both that the restraint occurred in and affected interstate commerce.

2. Whether the evidence was sufficient to establish that the restraint occurred in and affected interstate commerce.

3. Whether the trial court properly admitted into evidence a tape recording of a telephone conversation.

4. Whether the trial court erred in instructing the jury "carefully [to] scrutinize" all the evidence without also instructing it to give "careful scrutiny" to the tape recording.

## STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, is set out at Pet. 3-4.

## STATEMENT

After a jury trial, petitioner, a lawyer, was convicted of conspiracy to restrain interstate trade and commerce by fixing the retail prices of alcoholic beverages in the Clovis, New Mexico area, in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. 1 (C.R. 269).[1] He was fined $5,000.[2] The court of appeals affirmed (Pet. App. 1a-10a).

1. Members of the Retail Liquor Dealers Trade Association of Clovis, New Mexico (the "Association") conspired to fix the retail prices of liquor commencing in late 1966

[1]"C.R." refers to the Clerk's Record filed in the court of appeals.

[2]Ten other individuals, four corporations and a trade association were named as co-defendants. The district court found all guilty on their pleas of *nolo contendere*. The convictions were affirmed by the court of appeals, but the cases were remanded for resentencing. *United States* v. *Clovis Retail Liquor Dealers Trade Association*, 540 F. 2d 1398 (C.A. 10).



or early 1967. In December, 1972, James Messer and James Avery opened a discount package store in Clovis known as Riley's Switch and offered beer and liquor at prices below those agreed to by the conspirators (Pet. App. 2a). Soon after the opening, Association members attempted, without success, to convince Messer and Avery to join the conspiracy (*ibid.*). Messer reported the contacts to the police who, with Messer's consent, placed a recording device on his telephone (*ibid.*).

During the first week in January, 1973, defendant Kit Pettigrew, an occasional client of petitioner (Tr. 1922-1923)[3], asked petitioner to ascertain from Avery and Messer whether Riley's Switch would follow prices fixed by the Association or take the "discount approach" (Tr. 1924). Petitioner did not call Avery and Messer until after Pettigrew and two other members of the Association visited his law offices on January 9, 1973. The three liquor dealers advised petitioner that the Association had met that day and decided to cut prices in retaliation if Messer and Avery refused to cooperate (Pet. App. 2a). The trio requested petitioner to represent the Association in contacting Messer and Avery to seek their compliance (*ibid.*).

That evening, petitioner called Avery to inform him of the Association's decision (*ibid.*) and to ask Messer and Avery to come up to the Association prices (Tr. 1595-1598). Avery said he would have to talk to his partner (Pet. App. 2a). At Avery's suggestion Messer returned petitioner's call and recorded the conversation (*ibid.*). The recording was the primary evidence against Buzzard. It reflected an active attempt by Buzzard to solicit Messer's and Avery's participation in the price fixing conspiracy (Pet. App. 2a-4a and n. 1).

[3]"Tr." refers to the transcript of the district court proceedings as prepared for the court of appeals.

2. Before the tape was offered to the jury, the government laid the foundation for its admissibility. At a motions session on January 30, 1975, the government described the installation of the recording device (Tr. 216-219; Tr. 321-322). It also established the chain of custody: (a) Messer to Officers Chandler and Kingsbury (Tr. 251-253; Tr. 265; Tr. 328-329; (b) Officers Chandler and Kingsbury to the police station, into the evidence room (Tr. 253-254); (c) from the evidence room to Officer Bartosiewicz for copying and transcription (Tr. 255; Tr. 305; Tr. 301-302; Tr. 309); and (d) storage in the evidence room until transmittal to the grand jury (Tr. 306; Tr. 310-311; Stipulation, C.R. 253). Messer and Officer Chandler testified that the tape was the complete recording of the Buzzard-Messer conversation (Tr. 333-335; Tr. 259-260).

Petitioner contended that the recording should be barred because of the possibility of an intentional erasure of three minutes of alleged exculpatory conversation (Pet. App. 5a). The trial court ruled that, in light of the testimony that the tape was complete, petitioner's arguments went to the weight, not the admissibility, of the evidence (*ibid.*). The tape was admitted and petitioner presented "detailed" arguments to the jury on its credibility (*ibid.*).

At the close of the trial, petitioner requested that the court instruct the jury to "scrutinize the tape with care because of the conflicting evidence regarding its authenticity and completeness " (*ibid.*). The court did not give that precise instruction, but instead cautioned the jury not to give the tape any undue weight merely " 'because it is a tape recording' " (Pet. App. 5a-6a)[4] and instructed it

[4]The court of appeals described the trial court's instruction as "[You should] 'not give it any *value* weight' " (Pet. App. 5a, emphasis added). The transcript shows, however, that the trial judge stated: "You should not give it any *undue weight* * * * " (Tr. 2039, emphasis added).



"carefully [to] scrutinize every matter in evidence which tends to indicate whether a witness is worthy of belief" (*ibid.*).

The government also introduced evidence establishing the relationship of the conspiracy to interstate commerce. The liquor involved was manufactured outside of New Mexico, was stored temporarily in New Mexico warehouses, and was quickly distributed to the ultimate consumers, including non-residents of New Mexico (Pet. App. 8a; Tr. 1280-1286; Tr. 1290-1299; Tr. 1303-1307; Tr. 1311-1312; Tr. 1319-1322; Tr. 1333-1339; Tr. 1354-1360). The total sales of this liquor were approximately $1.8 million per year for several years, at wholesale, and $2,500,000 at retail (Pet. App. 8a and n. 3; PX 465, C.R. 581; Tr. 1372-1375).

3. The court of appeals held that the district court acted within its discretion in concluding that there was sufficient evidence of the tape's authenticity to admit it into evidence (Pet. App. 5a). It approved the court's instruction concerning the tape, particularly in light of the extensive testimony and argument before the jury concerning authenticity and completeness (Pet. App. 6a). Finally, the court held that the indictment adequately alleged and the proof established that the conspiracy both directly restrained interstate commerce and substantially affected it (Pet. App. 8a-9a).[5]

[5]The court also rejected Buzzard's contentions, not raised here, that his retrial after the declaration of a mistrial in his first trial violated the Double Jeopardy Clause, that there was a fatal variance between the proof at trial and the bill of particulars, that there was insufficient proof to show that he joined the conspiracy, and that the prosecutor unfairly badgered him at trial (Pet. App. 6a-7a, 9a-10a).

## ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. Petitioner concedes that the indictment adequately alleges a direct restraint of interstate commerce (Pet. App. 8a; Pet. 15). He contends, however, that the indictment does not set forth the "affecting commerce" theory and that evidence "apparently based on the affecting commerce theory" was beyond the scope of the indictment and thus was improperly admitted (Pet. 18).

The court of appeals correctly ruled that the indictment was sufficient to allow proof under the "affecting commerce" theory, as well as the "in commerce" theory (Pet. App. 9a). A price fixing conspiracy unlawfully restrains interstate commerce if it either occurs in the flow of or substantially affects that commerce. *E.g., Burke* v. *Ford*, 389 U.S. 320. The indictment alleged that there was a substantial volume of commerce moving from producers outside New Mexico into New Mexico and that since 1967 the defendants had conspired to restrain that commerce by fixing the prices at which the products moving in that commerce were sold (C.R. 21, 24). The volume of the interstate commerce affected by the conspiracy is comparable to that involved in *Hospital Building Company* v. *Trustees of Rex Hospital*, 425 U.S. 738, which held that a complaint alleged a sufficient impact on interstate commerce under Section 1 of the Sherman Act.[6]

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[6] In *Hospital Building Company*, the court rejected a claim that the provision of hospital services did not affect interstate commerce where the complaint alleged out-of-state purchases of $112,000; service to out-of-state patients; revenues from out-of-state insurance companies, Medicare and Medicaid; and a proposed hospital development plan to cost $4 million.



Thus, as the court of appeals held, the allegations here were sufficient and adequately informed Buzzard of the charge against him and allowed him to protect himself against double jeopardy (Pet. App. 9a). Evidence under that theory was therefore properly admitted.

2. Petitioner's challenge to the sufficiency of the evidence (Pet. 16-20) is groundless. The evidence showed that there was a steady flow of liquor in substantial amounts from out-of-state sources through wholesalers to the Clovis retailers and to the ultimate customers, including out-of-state purchasers (Pet. App. 8a). Although petitioner contends that the liquor ceased its interstate movement when it entered the warehouses of the New Mexico wholesalers (Pet. 16), the jury, to which this issue was submitted (Tr. 2028), rejected that contention, and there is ample evidence to support that determination.[7]

Similarly, petitioner's dispute with the court of appeals' determination that the price fixing conspiracy substantially affected interstate commerce (Pet. 19-20) is insubstantial. Price fixing conspiracies involving products not manufactured within a state—in this case, liquor—almost inevitably affect interstate commerce. *Burke* v. *Ford*, *supra*, 389 U.S. at 322. For several years the conspiracy affected an interstate liquor trade whose annual wholesale volume was approximately $1,800,000 and, based on the Association's 40 percent minimum markup, whose annual retail volume was at least $2,500,000 (PX 465, C.R. 581; Tr. 1648-1650). This is enough to prove a substantial effect on interstate commerce; courts have repeatedly held that conspiracies affecting a smaller

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[7] Evidence was presented detailing the rapid turnover of stock, the perishability of beer, and the not infrequent involvement of manufacturers with retailers (Tr. 1280-1286; Tr. 1290-1298; Tr. 1303-1307; Tr. 1311-1312; Tr. 1319-1322; Tr. 1333-1339; Tr. 1354-1360).

volume of commerce violate Section 1 of the Sherman Act. *E.g., Hospital Building Co.* v. *Trustees of Rex Hospital, supra; Rasmussen* v. *American Dairy Association*, 472 F. 2d 517 (C.A. 9), certiorari denied, 412 U.S. 950 (injured plaintiff's yearly profits of $36,720); *United States* v. *Finis P. Ernest*, 509 F. 2d 1256 (C.A. 7), certiorari denied, 423 U.S. 893 ($300,000 construction grant; $9,307 construction materials).[8]

3. Contrary to petitioner's contention (Pet. 9), there is no conflict between the decision in this case and those of other courts of appeals concerning the necessary foundation for admission of tape recordings.

*United States* v. *Knohl*, 379 F. 2d 427 (C.A. 2), certiorari denied, 389 U.S. 973, upon which petitioner principally relies, supports the decision here. In *Knohl*, a witness and her attorney tape recorded a conversation the two held with the defendant. Sixteen days after recording the conversation, and after an admittedly intentional erasure of part of the tape (*id.* at 439, n. 8), the witness temporarily gave the tape to the FBI for copying and then returned the original to a safe deposit box to which she alone had keys. The original was later removed from the box for an "aborted" copying attempt, then taken home and apparently misplaced by the witness. *Id.* at 439-440. Because the original was not available at trial, the government offered and the district court admitted a re-recorded version of the FBI copy of the original. *Ibid.*

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[8]Petitioner's contention that his conspiracy should be beyond the law because it tied up the liquor trade only in Clovis, rather than in the entire state of New Mexico (Pet. 20), is unsupported either by authority or by logic. If interstate commerce is affected, the local nature of the price fixing scheme is irrelevant. *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 189; *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U.S. 460, 464. To the extent that petitioner relies upon distinctions between "direct" and "indirect" effect on interstate commerce (Pet. 19), he urges a distinction which this Court rejected years ago. *Wickard* v. *Filburn*, 317 U.S. 111, 120; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 231-232.



The Second Circuit upheld the admission of the tape. It ruled that the trial court has broad discretion in deciding whether to admit tape recordings, and that the court had not abused its discretion. *Id.* at 440-441. In the present case, the Tenth Circuit, relying on *United States* v. *Hodges*, 480 F. 2d 229, similarly and correctly applied the "abuse of discretion" standard followed by various circuits in upholding the admissibility of tape recordings. *E.g., Monroe* v. *United States*, 234 F. 2d 49 (C.A. D.C.), certiorari denied, 352 U.S. 873; *Cape* v. *United States*, 283 F. 2d 430 (C.A. 9); *United States* v. *Madda*, 345 F. 2d 400 (C.A. 7).

The court in *Knohl* stated that there should be "clear and convincing evidence of authenticity and accuracy as a foundation for the admission of * * * recordings." 379 F. 2d at 440. Here there was such evidence (p. 4, *supra;* Pet. App. 4a-5a). As the court of appeals held, "with the exception of an alleged three-minute gap, there was no evidence throwing doubt on the tape's authenticity or completeness" (Pet. App. 6a). Contrary to petitioner's present claim of "strong evidence" of an intentional erasure (Pet. 11), the government presented convincing evidence that there was no gap.[9]

Petitioner also claims a conflict with *United States* v. *Starks*, 515 F. 2d 112 (C.A. 3) (Pet. 11). There is no conflict. In *Starks* the person who made the tape had "unusually strong motivations to shade his testimony"; there

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[9]Petitioner's only colorable claim of tampering rests on the fact that Dr. Messer initially noted on the tape that it was 29 minutes long, when in fact it was 26 minutes long (Pet. App. 5a). Dr. Messer explained that this discrepancy probably resulted from the use of two time pieces in the room where he made the recording, and he was confident that the tape as introduced was "complete"(Tr. 325-326; Tr. 2017-2019). Similarly, Lt. Chandler, who picked up the tape from Dr. Messer and listened to it the day after it was made, testified that it was accurate and complete (Tr. 250-254; Tr. 1509-1512).

was a clear four-month gap in the chain of custody; and the burden of proof was erroneously shifted to the defendant, who was required to negative authenticity. *Id.* at 119-122. In the present case, Dr. Messer had no such motive to shade his testimony; there was no gap in the chain of custody; and the burden of establishing authenticity was successfully carried by the government.[10]

4. Petitioner contends (Pet. 12) that the court of appeals' affirmance of the district court's rejection of petitioner's requested jury instruction on the tape also conflicts, "at least in principle," with *United States* v. *Knohl, supra.* Again, there is no conflict.

*Knohl* suggested that where the foundation evidence on authenticity and accuracy of a recording is conflicting, a trial court should caution the jury to "scrutinize the evidence with care." *Id.* at 440. The suggestion was *dictum*, since there was no conflicting evidence on authenticity and accuracy of recording, and even the *dictum* did not suggest any particular wording for the instruction.

Moreover, the district court's instruction here expressly cautioned the jury "carefully [to] scrutinize every matter in evidence which tends to indicate whether a witness is worthy of belief" (Pet. App. 5a-6a).

A defendant has no right to have the jury instructed in precisely the language he requests. *E.g., United States* v. *Noah,* 475 F. 2d 688, 697 (C.A. 9), certiorari denied, 414 U.S. 1095. Jury instructions, viewed as a whole, must fairly present any defense theory supported by law and evidence; but the form in which they are given rests in

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[10]Because there was no demonstrable erasure, but only unfounded allegations of tampering, *Brady* v. *Maryland,* 373 U.S. 83, as interpreted in *United States* v. *Bryant,* 439 F. 2d 642, 652-653 (C.A. D.C.) (Pet. 13-14), is inapplicable.



the sound discretion of the trial judge. *E.g., United States* v. *Noah, supra; United States* v. *Thomas,* 484 F. 2d 909, 912 (C.A. 6), certiorari denied, 415 U.S. 924. The court of appeals, in applying this standard (Pet. App. 6a), correctly held that the instructions as a whole, which required careful scrutiny of all the evidence, sufficiently informed the jury to scrutinize the tape carefully (*ibid.*). This instruction was adequate with respect to the recordings because, as the court of appeals noted, there was no evidence undermining the tape's authenticity and completeness except for the alleged three minutes gap, which had been the subject of extensive argument and testimony before the jury (Pet. App. 6a).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

DONALD I. BAKER,
*Assistant Attorney General.*

ROBERT B. NICHOLSON,
WILLIAM D. COSTON,
*Attorneys.*

JANUARY 1977.

DOJ-1977-01